

"Having heard all the evidence the court is partially satisfied that the charge has been proved since the accused have not given any reasonable explanation as to the charge against them. However, in view of the facts which have been given by P.W.3 and P.W.4 whom the court feels have an axe to grind, the court is taking a lenient view of their offences."

With the greatest respect to the learned magistrate I have to observe that he failed to apply and totally ignored the very elementary principles which a court of criminal justice must strictly adhere to. It is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer. The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation on his part but on the positive affirmative evidence of his guilt given by the prosecution. Numerous rules have from time to time been suggested by the courts when dealing with the question of the guilt or innocence of the accused. The following principles are not only sound but well recognised in practice:—

- (1) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution;
- (2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused;
- (3) In matters of doubt it is safer to acquit than to condemn.

A conviction cannot be sustained even if the court is satisfied that the prosecution story "may be true" unless and until it is found that the prosecution story "must be true." The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.

As the learned magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower courts that evidence discloses a *prima facie* case when it is such that *if uncontradicted* and *if believed* it will be sufficient to prove the case against the accused.

The following definition of "reasonable doubt" is often quoted:

"It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

It has again been said that "'reasonable doubt' is the doubt which makes you hesitate as to the correctness

of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there." Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

A notice was issued to all the three accused but one of them has not in spite of several attempts been served. The issue of a notice on revision is to ensure that no order is made by the High Court to the prejudice of the accused. The order which I propose to make in this case is not going to be to the prejudice of the accused. I have therefore decided that it can serve no useful purpose to adjourn the hearing of this revision again. Several attempts have already been made to serve the notice on one of the accused. The other two accused are before me.

I am glad the learned deputy has very rightly informed the court that he does not at all support the order which was made by the learned magistrate.

The order of the learned magistrate is set aside. The order of conviction is also consequently quashed and an order of acquittal and discharge substituted therefor.

Conviction quashed.

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LIM YAM TEK & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J. (Malaya), Suffian and Gill F.J.J.) April 1, 1971]

[Kuala Lumpur — Federal Court Criminal Appeal No. 31 of 1970]

Criminal Law and Procedure — Jury trial — Summing-up — Whether there was misdirection — When non-direction can be misdirection — Adequacy of defence put to jury — Powers of Federal Court in criminal appeals — Court of Judicature Act, 1964, s. 60(1).

This was an appeal against the conviction of the appellants on a charge of murder. The main question at the trial was who killed the deceased. The prosecution alleged that it was the appellants and two others. The appellants said they had nothing whatsoever to do with it. The defence was a complete denial. It was argued for the appellants that the summing-up was defective in that the defence case was never put to the jury and that they were in effect directed in such a manner as to discredit the defence witnesses.

Held, (Ong C.J. (Malaya) dissenting) dismissing the appeal: it is no misdirection not to tell the jury everything which might have been told and non-direction merely is not misdirection. The failure of the judge to refer in his summing-up to matters raised by the defence had not caused a misdescription of the whole bearing of the evidence.

Per Ong C.J., dissenting: "In this case, from first to last, the minds of the jury had been closed to the very question

the defence had required them to consider. In my view this is a fatal defect in the summing-up."

[**Editorial Note:** This is the first case in Malaysia where with the permission of the Lord President a member of the Federal Court in a criminal appeal gave a dissenting judgment. This is in accordance with the proviso to sub-section (2) of section 62 of the Courts of Judicature Act, 1964. It may be recalled that in the Singapore case of *Abdullah v. R.* [1954] M.L.J. 195, the then Court of Criminal Appeal was divided in its decision on an appeal against a conviction on a charge of rape.]

Cases referred to:-

- (1) *R. v. Dinnick* 3 Cr. App. R. 77, 79.
- (2) *R. v. Cooper (Sean)* [1968] 3 W.L.R. 1225, 1228.
- (3) *R. v. Bundy* 5 Cr. App. R. 270.
- (4) *R. v. Lamb* [1967] 3 W.L.R. 888, 895.
- (5) *R. v. Stoddart* 2 Cr. App. R. 217, 245-6.
- (6) *Abrath v. The North-Eastern Rail Co.* [1883] 11 Q.B.D. 440, 452.
- (7) *Arnold v. The King-Emperor* (1914) 41 I.A. 149, 168-9.
- (8) *Fajer Ali Darji & Ors. v. Emperor* A.I.R. 1934 Cal. 142.
- (9) *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462, 482.
- (10) *Lim Toh Sin v. Public Prosecutor* [1966] 1 M.L.J. 278, 280.
- (11) *R. v. Murtagh & Kennedy* (1956) 39 Cr. App. R. 72, 82.
- (12) *R. v. Kritz* 33 Cr. App. R. 169, 177.
- (13) *Berahir v. Public Prosecutor* [1968] 1 M.L.J. 298, 299.
- (14) *Herchun Singh & Ors. v. Public Prosecutor* [1969] 2 M.L.J. 209, 211.

FEDERAL COURT.

Dato V. Jeyaratnam (Pajan Singh Gill with him) for the appellants.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Ong C.J. (Malaya): By a majority verdict of 5 to 2 the jury found the appellants guilty of murder, for which they were sentenced to death by the High Court at Ipoh. Their appeal raises a number of grounds which may be said to fall under two main heads: first, misdirection or non-direction and, secondly, that the defence had not been adequately put to the jury.

The prosecution case depended entirely on the evidence of two witnesses who alleged that they saw four men, including these appellants, make a murderous attack with knives on one Ong Ah Peow, whose death, according to the medical evidence, was almost instantaneous from stab wounds in the heart and lung. This attack was said to have occurred at about 8.30 p.m. on April 19, 1969 during a stage performance at Seberang Port Weld, which is a small fishing community across the river opposite the town of Port Weld. The principal witnesses were Ong Yu Sew — a friend since childhood of the deceased — and Ong Ban Kim, the deceased's elder brother.

Ong Yu Sew's evidence was that he had accompanied the deceased to the show. The stage faced a Chinese temple about 50 yards opposite. Ong Yu Sew said he sat with the deceased some 38 feet in

A front of the stage, while Ong Ban Kim and another of his brothers, Ong Ah Heng, were some distance behind. Ong Yu Sew went on to say that while he was watching the show "people came from behind and they stabbed Ah Peow and he fell down. On seeing that I started to run away. Before I ran away I had a look at those people who stabbed Ah Peow. There were four people who stabbed Ah Peow". **B** He was able to identify all four by name, two of them being the appellants. After he had run a short distance towards the temple the "same four people" caught up with him and stabbed him. He was rendered unconscious and recovered his senses in the Taiping Hospital the following day.

C Ong Ban Kim next testified that he was watching the show with another brother, Ong Ah Heng, from about 10 yards behind Ong Yu Sew, when he saw four persons attacking the deceased. He too gave the same four names as did Ong Yu Sew. After the deceased fell down he saw *two of the four persons* chasing after Ong Yu Sew, while the other two continued to stab the deceased. **D** He did not know what happened to Ong Yu Sew after his escape, he did not see him stabbed, he did not know how Ong Yu Sew received his injuries, but admitted having stated at the preliminary enquiry that Ong Yu Sew ran away after being stabbed. When the assailants had disappeared he and Ah Heng went to render assistance to their injured brother, whom they carried across the river by boat. **E** Ah Heng took the deceased to the Taiping Hospital while Ong Ban Kim himself went to the police station and made his report. Later, when A.S.P. de Silva, the investigating officer, arrived from Taiping, Ong Ban Kim accompanied this A.S.P. to the scene and finally went home. He did not report to his mother the death of one of her sons nor tell anyone else of the stabbing. **F** He had known all the four assailants since childhood.

A.S.P. de Silva received information at 9.05 p.m. on the same night and, after calling at the hospital mortuary in Taiping to see Ah Peow's body, proceeded to Seberang Port Weld, arriving there at about 10.40 p.m. The show was still continuing and he saw that fluorescent lighting was used for the stage. **G** On examination of the scene he found a stain about 1 inch in diameter, which looked like blood, on a bench "about 25 yards from the stage". This was twice the distance stated by Ong Yu Sew. There were also a few drops of blood on the ground near this bench. At the temple he saw a small pool of blood on the floor. **H** When cross-examined regarding the lighting available for identification purposes, he stated that "apart from the lights on the stage there were no other lights in the square open space" seating the audience — which open space occupied "about 30 to 40 yards". It will be observed, from a perusal of his evidence, that the A.S.P. had made a thorough examination only of the square itself and that even there no measurements were taken, but merely approximations of the distance in respect of various points referred to. **I** He did not say how far the bloodstained bench was from the pool of blood on the temple floor, but from his description of the scene the distance could not have been more than 25 yards. Since the pool of blood could only

have flowed from the wounds of Ong Yu Sew and Ong Ban Kim had been seated about 10 yards behind him before the attack, it is abundantly clear that Ong Ban Kim must have been an eye-witness of the felling of Ong Yu Sew, if it was true that he saw the killing of his brother.

The defence of the first appellant, that he had taken no part whatsoever in attacking the deceased was supported by his witness Puah In Tian alias Puah Char Bo, who stated that he was at all times with this appellant, among another section of the audience when a commotion took place elsewhere. After the incident the crowd dispersed and they went their respective ways home. This witness, I should observe, had given a recorded statement to A.S.P. de Silva in the course of investigation. The prosecution thus had the fullest opportunity to check upon its veracity, but his evidence was in no way impeached or shaken by the prosecution. The evidence he gave, therefore, must be presumed to have been entirely consistent with the recorded statement. He and Ong Ban Kim, according to this prosecution witness himself, were "good friends" — which goes a long way to show that he was wholly unbiased.

The second appellant's defence, too, was an alibi. He was in Kuala Lumpur, assisting his father in his trade as fishmonger, when he received news that his grandmother was seriously ill at the Taiping District Hospital. He left Kuala Lumpur on April 19 by taxi and reached Taiping at about 6 p.m. He visited his grandmother in Ward 15 and leaving her at about 7.30 p.m. he walked to the taxi stand in Taiping Town. There he met a Malay taxi-driver named Mat bin Darus at about 8 p.m. He had to wait for some time until an Indian bound for Matang turned up to fill another place in the taxi. Thereupon the taxi took the two passengers as fares to Matang and Port Weld respectively, departing from Taiping at about 8.30 p.m. This appellant reached Port Weld at about 9 p.m. and proceeded to his uncle's house. He was nowhere in Seberang Port Weld at the relevant time and so could not have taken part in the attack on the deceased. He was subsequently arrested in Kuala Lumpur on May 5, 1970. Mat bin Darus, the taxi-driver, fully corroborated the evidence of this appellant in every detail and there is not an iota of evidence on the record which the prosecution could point out as showing that he was helping to concoct a false alibi.

The defence, in addition to offering evidence corroborating the alibi of each appellant, called Ong Eng Kek. He was a reputable shop-keeper, the village headman, of whom the only criticism made was that he had not volunteered to make any statement to the police. He deposed that at about 8.30 p.m. on April 19 he heard "people quarrelling" outside. He came out and saw the deceased prostrate and bleeding. Taking fright, he closed his shop and stayed in for fear that people might run inside. He was unable to identify any of those he saw running away from the scene as he came out and he did not see who later removed the body. In cross-examination he said he "believed" the police were outside his shop that night but he did not go up to them because they had not called him.

A He was not asked the grounds of his belief for so thinking and nowhere in the prosecution case was there any evidence that, if the police were at any time, as he thought, outside his house, they were not merely passing by on their way to and from the jetty. He was at no time sought out by the police in the course of investigation for any information. The relevance of his evidence was undoubtedly connected with what B the first appellant's witness, Puah In Tian, had testified to earlier, that while walking home he had to pass the shop of Ong Eng Kek — it was then nearly 9 p.m. — and he saw in front of the latter's house a pool of blood on the ground; the blood was in patches over an area of about 3 to 4 feet in diameter. These patches were in front to the right of the house about 8 feet away.

C The object of the defence in calling the village headman clearly was to show that the deceased died of an attack outside the headman's shop, separate and distinct from the encounter described by the prosecution witnesses. The headman had seen the deceased dead or dying in a pool of blood. Puah In Tian, too, D had seen the blood while on his way home — by which time the body had already been removed. Were both these independent witnesses, on oath, telling lies? If so, it would seem to be an extraordinary way of presenting evidence in order to discredit the prosecution witnesses.

E Assuming that there was, in truth, all that much blood outside the headman's house, whose could it have been? Ong Yu Sew, who did not die of his wounds, left a pool of blood on the temple floor. The deceased had multiple stab wounds, 18 in all, from some of which he must have bled copiously, according to the medical evidence. One should naturally have expected to see blood, where he was laid low, in larger quantities than F the pool left by Ong Yu Sew. Yet the A.S.P. found nothing more than a bloodstain about 1 inch in diameter on a bench and a few drops of blood nearby. This could not possibly have been all the life-blood which poured out of the deceased, had he fallen dead there. The explanation was provided by the two defence witnesses, who saw plenty of blood outside the headman's house. The question therefore arises: whose G story was consistent with the presence of pools of blood seen at both places? The prosecution version left one pool of blood unexplained. The defence accounted for both. The jury accordingly should have been directed to find as a fact whether or not there was a pool of blood outside the headman's house, as the defence claimed. But the question was never left H to them at all. This defence was one specifically raised by the defence case but never put to the jury. Instead, the learned trial judge appeared to have jumped to the conclusion, from the medical evidence, that the first blows struck were necessarily the fatal ones, because the deceased could not have run far after being I stabbed in the heart. That the jury were invited to share the judge's view appears from these directions: —

"We have further the evidence of the doctor who said that from the nature of the injuries that she saw on the body of the deceased, she was of the opinion that the deceased must have died almost immediately after receiving those injuries and she was also of the opinion that after receiving the injuries it was not likely that the deceased could

have moved very far away. In the present case the A.S.P. also did not find any trail of blood at the scene but only some bloodstains on the bench and on the ground near it and at another spot in the temple."

The effect these directions must have had on the minds of the jury was most unfortunate. Since they were instructed that all the evidence pointed to the deceased falling at the spot where he was said to have been stabbed, it followed that both Ong Ban Kim and Ong Yu Sew were to be believed, whereas the headman and Puah In Tian were not. It was further assumed for a fact that the blood-stain on the bench was necessarily the deceased's. Might it not have been the blood of Ong Yu Sew? It will be remembered that Ong Ban Kim admitted having stated at the preliminary enquiry that Ong Yu Sew ran away after being wounded. The defence case was that the deceased could not have been there, according to the headman, Ong Eng Kek. Had this possibility been left to the jury — leaving them with open minds regarding the defence case, that the deceased died in a separate attack elsewhere — they might very well have come to the opposite conclusion, by accepting the evidence of the headman and Puah In Tian as true. In that event it is inevitable that they must disbelieve the alleged eye-witnesses.

As to the credibility of those prosecution witnesses, I have very grave doubts myself on perusal of their evidence. First, it may be observed that Ong Ban Kim, if indeed he was present among the audience, was not disturbed by any attack on himself. The blood-stained bench was 25 yards from the stage and so half-way between stage and temple. Ong Ban Kim did not go to the aid of the deceased until all the assailants had fled. Consequently he must also have watched the attack on Ong Yu Sew from start to finish. Being closer to the temple from where he sat, he could not have missed seeing Ong Yu Sew's assailants catching up on him and striking him down. Since he categorically denied seeing what must have happened in full view of himself, should his story that he was an eye-witness to the slaying of his brother be accepted at its face value?

Secondly, Ong Ban Kim and Ong Yu Sew gave two different versions of the attack. Ong Yu Sew said he was chased and attacked by the same four who had struck down the deceased. Ong Ban Kim, however, stated that two remained behind and continued stabbing his brother. On a matter of fact, they had manifestly contradicted each other, so that one version of the incident must be false, if not both.

Thirdly, it seems to me highly significant that Ong Ban Kim, who saw his brother slain, told not a soul about it. He had known all the four alleged assailants since their childhood. Their names should readily have been on the tip of his tongue and he should have been anxious above all else to bring his brother's murderers immediately to book. Yet he mentioned no names at all when he made his police report; over two hours later, when he took the A.S.P. to the scene, he could have disclosed these names and led the officer to the homes of these appellants, but did not: when he eventually went home that night, he still told nobody

A — not even his own mother, of the death of one of her sons. The question naturally arises: What reason was there for such complete reticence unless he did not know who the assailants were? The omission was stressed by the defence, to which the judge supplied the answer. He stated the proposition — which might very well appear to the jury as one of law to start with — and next they were told to consider the question as one of fact, as follows: —

B *"The law does not require that the person making a report must disclose the names of the assailants. It is for you to decide in what state of mind P.W. 3 was on the day when he went to lodge the report. He no doubt said in evidence that he did give their names but we know as a fact that the names of the assailants are not in the report. It is possible that in the course of making the report he was excited and might have forgotten to give the names of the assailants. This is a question for you to consider."*

C In the circumstances, would it be unfair to say that the jury were invited to overlook the omission altogether? Once they gained the impression that non-disclosure of names was immaterial in law — and it must be remembered that they had been told to accept rulings on law without question — what independent conclusion could the jury have come to but regard it as immaterial also in fact? Furthermore, forgetfulness in the excitement of the moment was not the reason given by Ong Ban Kim — he gave no reason in fact. At any rate it was plain beyond dispute that he mentioned no names to the A.S.P. — long after the excitement was over — and the judge still thought the omission to disclose the names to the investigating officer gave no cause for comment. Was it not the first thought which should have occurred to anyone that Ong Ban Kim's failure to name these appellants was because he did not know who were involved in his brother's death? The defence contention was that he did not know; but this question again was never put to the jury.

E It was, of course, the prosecution case that these appellants were positively identified by two persons, so that, even if the evidence of Ong Ban Kim was rejected, there still remained the identification by Ong Yu Sew. The answer, in my view, is that there was one acid test which should have been applied to prove that both were equally unworthy of credit. Both of them stated that the deceased died at the spot where he was attacked. If what Ong Eng Kek, the village headman, and Puah In Tian said was true, that the deceased died as the result of an attack outside the headman's house, then there can be no doubt that the prosecution witnesses were lying. Why should they falsely implicate these appellants? The answer again may be found in the evidence on the record. The judge did refer in his summing-up to the involvement of the persons concerned in secret societies — that these appellants had been threatened by Ong Yu Sew, Ong Ban Kim and others for refusing to join their Green Dragon Secret Society. I think there can be no doubt that the attacks on the deceased and Ong Yu Sew were the result of some secret society feud. To the knowledge of Ong Yu Sew, one of the four who attacked him and the deceased, has since died "a few months ago" — his name was Lau Weng Thong. Against a secret society background, it is not unreasonable to

suppose that, if Ong Ban Kim had no compunction about falsely incriminating these appellants, he should have none in persuading Ong Yu Sew to do likewise. Gangsters who do not hesitate to use the knife certainly will show no hesitancy in using the machinery of justice to achieve their ends against their enemies. Even assuming that these appellants were gangsters, they were entitled to have their defence, however thin, adequately put to the jury.

In what light were the defence witnesses presented to the jury? No attempt was made by the prosecution to impeach the credit of the headman other than to ask why he had not given any statement to the police. His answer was that he had never been approached in the course of police investigation for any statement. How was he to know what information the police would consider relevant? Merely because he had not volunteered information which nobody appeared to have regarded him as capable of providing, was his evidence on that account to be disregarded, even if relevant? Yet the jury were invited to look at his evidence in this light:—

"You will also have to consider whether Ong Eng Kek, the Chairman of the Local Council, Sebarang, has been telling the truth. You might like to ask yourselves whether as Chairman of the Local Council and the leader of the community of Sebarang Ong Eng Kek would have remained silent and not volunteer to give information to the police regarding what he said he saw if it was true. This is a question of fact for you to decide."

Of the other defence witness, the jury were directed, immediately after the above comments on the headman's credibility, "also in that light" to consider whether Puah In Tian's evidence could count against that of the A.S.P. thus:—

"If what Puah Char Bo said, that he saw many people crowding in front of the Local Council Chairman's shop and looking at some patches of blood is true, then would it not be likely that the A.S.P. who carried out the investigation also would have noticed the presence of these patches of blood. You will no doubt recall that the A.S.P. was never cross-examined by the defence as to whether he went to the place in front of the Local Council Chairman's shop to find out whether there was any blood there or not. This is also a question of fact for you to decide."

With respect, there appears to have been some confusion of evidence, when reference was made to the crowd, as if they were still there when the A.S.P. arrived long after Puah In Tian had gone home. All that Puah said was that when he saw the blood "many people were looking at them". If this crowd had melted away by the time the A.S.P. arrived two hours later—and there was no evidence to the contrary—what was there to attract the attention of the police officer to the blood on the floor, invisible in the dark of night, when there was no longer anybody around? The jury, of course, looked to the judge to sift and correlate the evidence for them and since they were directed in a manner which caused them to look with suspicion at the evidence of the defence witnesses, it is perhaps not surprising that five jurymen out of seven did so to the point of disbelief. They were never reminded that, in his favour, Puah In Tian had given a statement to the police, on which he could have been discredited, had he given any evidence differing from his statement in any material respect.

A It is true that the learned trial judge did recapitulate the evidence of each defence witness in his summing-up. But, in view of the defence case, they should have been asked the specific question: Did they believe that the deceased died among the theatre audience or outside the headman's house? On any proper analysis of the evidence, that was the decision required of the jury. It was the defence case on two grounds: first, if they find as a fact that the deceased died outside the headman's house, the two prosecution witnesses would have been shown to be liars; secondly, even were Ong Yu Sew's evidence believed in so far as it relates to his own wounding by these appellants, the slaying of the deceased in a separate encounter elsewhere could not necessarily be imputed to these appellants. Of the deceased's death being the result of an attack elsewhere there was not an iota of evidence, for that was not the prosecution case. The defence thus specifically raised was not put to the jury for the simple reason that it had been assumed as a fact that the deceased died where the two prosecution witnesses said he did. In this connection it is strange indeed that among hundreds of people who were present at the show there was not a single independent witness called by the prosecution to rebut the defence case that the deceased was not struck down before their very eyes. The defence had so adumbrated their case when it was put to Ong Ban Kim in cross-examination that the deceased "was stabbed in front of Ong Eng Kek's house".

In this case, from first to last, the minds of the jury had been closed to the very question the defence had required them to consider. In my view this is a fatal defect in the summing-up. As the Lord Chief Justice said in *R. v. Dinrick*:⁽¹⁾

F "But there is a principle of our criminal law which we think has been violated in this case — namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. . . . It may have been very foolish and unfounded, but that defence ought to have been put before the jury — this is a paramount principle of our criminal law . . . ; and under the circumstances we think that the conviction must be quashed".

G In England section 2(1) of the Criminal Appeal Act 1968 provides that—

"... the court ... shall allow an appeal against conviction if they think — (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. . . ."

In *Reg. v. Cooper (Sean)*⁽²⁾ Widgery L.J. said:—

H "The important thing about this case is that all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed, Mr. Frisby for the defendant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act, 1966 — provisions which are now to be found in

section 2 of the Criminal Appeal Act, 1968 — it was almost unheard of for this court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. . . .

We have given earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury, notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy. After due consideration, we have decided we do not regard this verdict as safe, and accordingly we shall allow the appeal and quash the conviction."

The powers of this court in criminal appeals are as set out in section 60(1) of our Courts of Judicature Act 1964 to "confirm, reverse or vary the decision of the trial court or . . . make such other order in the matter as it may seem just". This is in identical terms with section 29(1) of our Courts Ordinance 1948 now repealed. It has always been the practice of our appeal courts in following the principles laid down in section 4(1) of the Criminal Appeal Act 1907, to

"allow an appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence . . . or that on any ground there was a miscarriage of justice".

In recent years certain doubtful decisions, as in *Evans* and *Hanratty*, have in no small degree led to the passing of the provisions now set out in section 2(1) of the Act of 1968, which enabled Widgery L.J. to allow an appeal where the court felt genuinely troubled by lurking doubts as to whether an injustice had not been done in the special circumstances of that particular case. The provisions of section 60(1) of our Judicature Act, in my view, need no amendment for the application of the same principles which now apply in England.

In the instant case, it is perfectly true that the jury had the advantage of seeing and hearing the witnesses but such advantage cannot outweigh defects in the summing-up whereby, to quote Pickford J. in *Bundy*⁽³⁾ "the trial was not satisfactory as the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence". For my part, I feel that the shutting out of a defence specifically raised was not merely a matter of raising lurking doubts. In the words of Sachs L.J. in *Regina v. Lamb*:⁽⁴⁾

"... the defendant was entitled as of right to have his defence considered, but he was not accorded this right and the jury was left without a direction on an essential matter."

The verdict there could not stand, and for my own part, I take the view that the verdict in this case should likewise be set aside.

Suffian F.J. (delivering the majority judgment): The main question in the trial below was — who killed the deceased? The prosecution says it was the two appellants and two others. The two appellants say that they had nothing whatsoever to do with it.

A The prosecution relied a great deal on two eye-witnesses. Ong Yu Sew @ Ong Ah Sew (P.W. 2) said that he and the deceased were watching a *wayang* on the night of 19th April, 1969, at Seberang, Port Weld, when suddenly four people including the two appellants came and stabbed both him and the deceased; that the deceased fell down and he himself was then chased by all the four; and that he had known all the four long before the incident. Ong Ban Kim @ Ong Cha Koon (P.W. 3), a brother of the deceased, said that he was also at the *wayang* with a third brother some distance behind and he saw the deceased and P.W. 2 being stabbed by the four assailants whom he had known since childhood, that he took the deceased by sampan to Port Weld where he arranged for the body to be taken to hospital, and that he himself went to the Police Station where he made a report.

B The defence was a complete denial. The first appellant said that, though he also was at the *wayang* with a friend and heard a commotion from the spectators on the right-hand side of the stage, he himself was only an innocent bystander and took no part in it. His friend (D.W. 2) gave evidence in support. **D** The second appellant said that at the time of the incident he was somewhere else in a taxi and he called the taxi driver, Mat bin Darus (D.W. 4), to give evidence in support.

E There were other witnesses, but the above are the most important.

Which side were the jury to believe?

The learned judge correctly told them that the appellants were presumed innocent, that it was for the prosecution to prove their case beyond reasonable doubt, and that the defence needed only to raise a doubt in the jury's minds. He said:

F "... that means that even if you are not convinced of the truth of the defence story, still if you consider that it is probable or that it is reasonably true or if you cannot make up your minds as to whether [the appellants are] guilty or not, then you must give the benefit of the doubt to the [appellants] and return a verdict of not guilty."

G In the event the jury by a majority of five to two returned a verdict of guilty; the learned judge obviously did not think the verdict perverse and he concurred and sentenced the appellants to death.

H In determining this appeal it is important to bear in mind that the evidence in this case is entirely oral and that there was ample evidence, if believed, to justify the majority of the jury in arriving at their verdict. That being so, it is not open to an appellate court to reverse that verdict unless it can be shown that there has been misdirection in the learned judge's summing-up.

I Dato' Jeyaratnam, counsel for the appellants, sought to persuade this court that there was misdirection.

In considering his arguments we should bear in mind the proper principles to be applied by an appellate court when considering criticism of a summing-up. Those principles were stated by the learned Chief

Justice of England in *Joseph Stoddart*⁽⁵⁾ at page 245-6 as follows:

"We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this court. As appears from the judgment which has just been delivered, the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing-up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. Probably no summing-up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of twenty days, would fail to be open to some objection. To quote Lord Esher's words in *Abrath v. The North-Eastern Rail Co.*⁽⁶⁾— 'It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must shew that something wrong was said or that something was said which would make wrong that which was left to be understood.' Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."

In an earlier case *Arnold v. The King-Emperor*⁽⁷⁾ the Privy Council expressed at page 168 the same view in the following words:

"A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred, this Board will interfere."

Applying the above Privy Council case, a Calcutta court twenty years later in *Fajer Ali Darji and Others v. Emperor*⁽⁸⁾ said that where all the main points in the evidence had been carefully placed before the jury, and where one or two minor details to which reference has been made before the appellate court had not been placed before the jury, that would not amount to such a misdirection as to vitiate the entire trial.

We now turn to Dato' Jeyaratnam's arguments, which we shall deal with in the order used by him in this court.

Dato' Jeyaratnam submitted that the learned judge was wrong in ordering the jury not to consider the defence evidence until they were satisfied that the prosecution had proved a *prima facie* case against the appellants. We see no merit in this argument. It is true that the learned judge himself decided at the end of the prosecution case to call on the appellants

A to enter on their defence. It is also true that in his summing-up he told the jury that, if the prosecution failed to prove a *prima facie* case against the appellants, then they should not even consider the defence and that they should immediately return a verdict of not guilty. That was perfectly proper, see subsection (iii) of section 214 of the Criminal Procedure Code (Cap. 6).

B Dato' Jeyaratnam complained that the learned judge "compartmentalised" the evidence for the prosecution and that for the defence, and that nowhere in his summing-up did he direct the jury to review the whole of the evidence, and he referred to *Woolmington v. The Director of Public Prosecutions*⁽⁹⁾ *Lim Toh Sin v. Public Prosecutor*⁽¹⁰⁾ and *R. v. Dennis Patrick C. Murtagh & Kenneth Kennedy*.⁽¹¹⁾ We see no merit in this argument. The summing-up must be read as a whole, and when that is done it will be seen that the learned judge clearly directed the jury to review, though he did not use the word "review", the whole of the evidence. As was said by the Lord Chief Justice of England in *Kritz*⁽¹²⁾ at page 177:

D "It is not the particular formula of words that matters; it is the effect of the summing-up."

Dato' Jeyaratnam's next objection is this. The prosecution, to prove that it was the appellants who stabbed the deceased, relied on the evidence of two eye-witnesses, P.W. 2 and P.W. 3. P.W. 3 is the brother of the deceased. After the incident he had the presence of mind to take the deceased's body in a sampan to Port Weld, where he made a report to the police. He said that he knew the four assailants since his childhood days and yet he did not tell anyone about the stabbing. He did not tell his mother. Nor did he tell A.S.P. de Silva (P.W. 7) whom he conducted round the scene a few hours after the incident. When he made the first report to P.C. Hassan (P.W. 4), he said that he named the four assailants, but the police constable himself denied it and said that, if the four assailants had been named, he would have recorded their names. The first report (Exhibit P3) did not contain their names. It was submitted that the learned judge should have directed the jury to treat the evidence of this witness with suspicion, and his failure to do so was fatal and counsel referred to *Berahir v. Public Prosecutor*.⁽¹³⁾

We do not think there is any merit in this argument. As was pointed out by this court in *Herchun Singh & Others v. Public Prosecutor*,⁽¹⁴⁾ in endorsing *Sohoni's* commentary on section 154 of the Indian Criminal Procedure Code (16th edition, volume 1, page 750), which is similar to section 107 of our Criminal Procedure Code, the first information report "need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters." Moreover, P.W.3 was not the only eye-witness. P.W.2 was also an eye-witness of the stabbing and his evidence was that he also recognised the appellants and the two other assailants whom he had known "long before this incident". There were discrepancies in the evidence. P.W.2, who was also stabbed by the four assailants, said that after he had been stabbed he was

chased by all of them, and P.W. 3, who said that he was present at the scene as an innocent bystander, saw only two persons chasing P.W. 2. There are other contradictions in the evidence, but in our view they were of a minor nature in the face of the main question as to who were the assailants. The learned judge did not in his summing-up itemise these discrepancies, but he did warn the jury that, if they considered the discrepancies were serious, then they must reject the evidence of the witnesses concerned. The impression made on the jury by the pauses, hesitations and demeanour of the witnesses when giving evidence in court may be totally different from the impression made on us by the cold print of the appeal record. Five members of the jury preferred the evidence of P.W. 2 and P.W. 3 to that given by the appellants and their witnesses. They were entitled to do so, and there was evidence, if believed, to justify their verdict of guilty.

Mr. Ong Eng Kek (D.W. 5) was called in support of the second appellant's case. Mr. Ong was *ketua* of the village. Dato' Jeyaratnam complained that the learned judge in his summing-up expressly referred to the fact that Mr. Ong in cross-examination admitted that he did not give any statement to the police and thereby invited the jury to draw an adverse inference. We are of the opinion that this passage in the summing-up was pure reportage. Again and again throughout his summing-up the learned judge emphasised to the jury that matters of fact were entirely for them to consider.

Dato' Jeyaratnam submitted that the learned judge was wrong in directing the jury that the investigation officer had not been cross-examined by the defence as to whether he went to the place in front of Mr. Ong's shop to find out whether or not there was any blood there and in inviting the jury, since the investigation officer did not notice the presence of patches of blood there, to draw an inference adverse to the defence. The defence case in the lower court was that the deceased, on being stabbed, could not have fallen dead at or near the scene, but that he had sufficient life to run some distance to die in front of Mr. Ong's house. It was obvious from the verdict of the jury that they did not regard it as important where the deceased dropped dead. Moreover, A.S.P. de Silva gave evidence to say that he found a small pool of blood on the floor of the temple, which was not very far from the bench where the deceased was stabbed.

Dato' Jeyaratnam's next complaint is this. Both appellants gave evidence on oath. The first appellant's defence was that, though he was present at the *wayang*, he was an innocent bystander and took no part in the stabbing. He called a witness, D.W. 2, in support of his case. D.W. 2 had earlier made a statement to the police, as confirmed by the investigation officer. If his evidence was different from his statement to the police, he could have been cross-examined on it, but that was not done, which shows (it was submitted) that his credit had not been impeached: Dato' Jeyaratnam argued that the failure of the learned judge to mention this in his summing-up was a misdirection.

A The second accused's defence was that at the time of the stabbing he was elsewhere in a taxi and he called the taxi driver, Mat bin Darus, to corroborate him. Dato' Jeyaratnam complained that nothing was said of his independence and of the fact that he was unshaken in cross-examination, by the learned trial judge in his summing-up. In our judgment it is no misdirection not to tell the jury everything which might have been told and non-direction merely is not misdirection. We are in the region of facts. The failure of the learned judge to refer in his summing-up to these matters has not caused a misdescription of the whole bearing of the evidence. Here again the jury were entitled to rely completely on the impression made on them in court by the oral testimony of witnesses whom they saw and heard.

B Finally Dato' Jeyaratnam submitted that the case for the defence had not been put to the jury in a way to ensure the true evaluation of the appellants' evidence. We think that, on the contrary, all the main points in the evidence had been carefully and fairly placed before the jury and that therefore this appeal should be dismissed and the conviction upheld and sentence affirmed.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong.*

FOONG NAN v. SAGADEVAN

[F.C. (Ong C.J. (Malaya), Suffian and Gill F.J.J.) April 1, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 77 of 1970]

Negligence — Contributory negligence — Foreseeability — Avoiding action — Finding of fact by judge — Appeal — Damages — Interest — Affirmed on appeal.

In this case the learned judge had held that the appellant was solely responsible for a collision between a Fiat motor car driven by him and a Honda motor-cycle driven by the respondent. He found that the accident occurred while the motor car was overtaking some cyclists and while doing so it went to the wrong side of the road. He awarded damages and interest in respect of the damages.

Held (Ong C.J. (Malaya) dissenting): (1) the learned trial judge was justified on the facts in concluding that the accident occurred as a result of the defendant's negligence alone;

(2) the learned judge was right in awarding damages and interest in this case.

Cases referred to:-

- (1) *Dorrington v. Griff Fender (Swansea) Ltd.* [1953] 1 W.L.R. 690, 695.
- (2) *Jones v. Livox Quarries Ltd.* [1952] 2 Q.B. 608, 615.
- (3) *Kerry v. Carter* [1969] 1 W.L.R. 1372, 1376.
- (4) *Jefford v. Gee* [1970] 2 W.L.R. 702.

FEDERAL COURT.

N. T. Rajah (Y. C. Chin with him) for the appellant.

M. Sivalingam for the respondent.